

1 A I don't know. I don't have a complete list of all
2 the documents that were provided. It's possible they were.
3 It's also possible they were not. You wanted our customer
4 information, not so much information on other dealers. So,
5 I don't know. I can't tell you yes or no, if there was or
6 wasn't.

7 Q Now, it's correct, is it not, that if radios were
8 used for a demo use and a customer then decided to enter
9 into -- to have service, you know, to pay for service on the
10 repeater system, that that customer would then show up on
11 your computer system?

12 A When a customer bought and signed a contract with
13 us, he had a repeater service; yes, they would show up
14 either directly as our customer or as -- in the case of
15 Metro Mobile, which was doing its own billing, it would --
16 show us a subaccount that they were billing.

17 Q Okay.

18 A It would show up in some fashion.

19 Q Okay. Just to clarify the record, Mr. Kay, would
20 you turn to page 208 of Exhibit 19?

21 A Which exhibit number?

22 Q Page 208.

23 THE COURT: Bureau Exhibit 19?

24 MR. SCHAUBLE: Nineteen. And this is notation

25 WNXW280, page 2.

1 THE WITNESS: Okay. Exhibit 19. Which page
2 number? Two?

3 MR. SCHAUBLE: 208.

4 THE WITNESS: Okay.

5 BY MR. SCHAUBLE:

6 Q And do you see about halfway down through the
7 listing, there's a listing for Metro Mobile Communications?

8 A Yes.

9 Q Okay. Would that represent -- now, that is not an
10 instance in which Metro Mobile Communications was actually
11 using those radios. Correct?

12 A Metro had its own radios that it operated in
13 there, and it did billing to its own customers, reselling
14 our service. So, without looking at more extensive
15 documentation, I can't tell you if this is all -- one
16 hundred percent of this number is Metro Mobile's customers
17 or they're units that they themselves use for in-house are
18 in there. I suspect they're in-house is not in there.

19 This is used for the billings. And we didn't bill
20 them for their own internal use. So, I don't -- I can't say
21 that I absolutely, but I don't think their own internal
22 count is -- is in this number.

23 Q Okay. Mr. Kay, do you have a copy of what's been
24 admitted as an exhibit -- I believe it's Kay Exhibit 67?
25 That's the May 1994 application.

1 Your Honor, may I approach the witness?

2 THE COURT: Yes.

3 THE WITNESS: Yes. I -- 65, you said?

4 MR. KELLER: Sixty-seven. The modification.

5 THE WITNESS: Not 65. All right. I have it.

6 BY MR. SCHAUBLE:

7 Q Now, is it correct, Mr. Kay, that if this
8 application is granted, that you would not be giving up
9 exclusivity on any of the channels on which you would be
10 operating after this application was granted?

11 A Not within the 40-mile radius of my repeaters.

12 Q Okay.

13 A If someone applies on the short space and locates
14 a claim more than 40 miles from one of my relays, well, they
15 can certainly apply.

16 Q Now --

17 A Nowhere on this space here does it say anything
18 about exclusivity. Exclusivity is subject to the locations
19 of the repeaters, the bubble-loading accounts associated
20 therewith, and a rather labyrinth maze of regulations. Plus
21 even the written regulations can be bypassed through
22 engineering studies.

23 So, I think the use of the word "exclusivity" is
24 very much subject to interpretation.

25 Q Now, is it correct that nothing in this

1 application provides any information concerning the status
2 of loading on the channels that are the subject of this
3 application? Correct?

4 A The application didn't require it. The Commission
5 never made inquiry in the four-and-a-half years it's been
6 pending.

7 Q Now, you testified concerning documents you would
8 prepare for Carla Pfeiffer. And you were asked a question
9 as to what you would do to those documents. And you
10 testified that you would provide Ms. Pfeiffer with a copy.

11 Do you recall that testimony?

12 A That's correct.

13 Q Okay. Would it also be correct that you would
14 also submit copies of these documents to the FCC?

15 A Well, some of them would go to the FCC. The
16 coordination forms go to the authorized coordinator NABER.
17 They wouldn't be submitted to the Commission.

18 And for checks, well, there were ones that were
19 made to NABER, the coordinator. So, they wouldn't go to the
20 Commission.

21 It's my practice when I prepare documents for
22 anyone and they come and sign them, that they get a copy of
23 the document. And when you sign your tax return, you expect
24 to get a copy of it from your tax preparer.

25 Q Okay. You gave testimony yesterday, Mr. Kay,

1 concerning loading cards. My only question is, were loading
2 cards used with respect to the 470 to 512 bands?

3 A No. Loading cards that I discussed were kept by
4 the Commission solely for 800, and I'm not sure if they kept
5 them for 900 as well. I know I only ordered the 800 ones.
6 The Commission had something else for subpart L, what they
7 call control file lists, which are not quite the same thing.

8 Q For the record, Mr. Kay, could you explain what
9 type of information was contained in the control file list?

10 A I can, but I think you're more qualified because
11 they're FCC publications. They're a -- basically, a written
12 print-out of selected portions of the database filtered
13 by -- there's a channel between 470 and 512 megahertz. And
14 in one of the cities where these frequencies are assigned,
15 it then breaks it down by radio service. And then it breaks
16 it down to a buy-frequency order.

17 The Commission kept these records by frequency
18 interestingly enough. And then it listed the various
19 licensees on each frequency. The call signs, the grant and
20 expiration dates of the license, and certain details of the
21 license, like where the repeaters were located, the
22 geographic coordinates and the number of bay station
23 controls and mobiles. This is basically the information
24 contained on the control file lists.

25 Q Okay. Mr. Kay, can you turn to Kay Exhibit 48?

1 That's the inventory of radios.

2 MR. SHAINIS: What exhibit number?

3 MR. SCHAUBLE: Forty-eight.

4 THE WITNESS: Okay.

5 BY MR. SCHAUBLE:

6 Q Now, in this list -- you see there is a column
7 there, FREQ that stands for "frequency?"

8 A Right.

9 Q Now, turning to example BIN1005, which is a
10 Motorola Maxar radio.

11 A Right.

12 Q The 800 -- would that be an indication that that
13 was an 800 megahertz conventional radio?

14 A Yes.

15 Q Okay. And turning -- for example, for BIN1012,
16 Motorola Mostar radio. Frequency there, 460 megahertz?

17 A That would be some type of center tune; it would
18 indicate the radio would be -- would operate between like
19 450 megahertz through probably tunable to 476 megahertz; it
20 would cover anywhere in that band from wherever it was
21 programmed.

22 Q Okay. So, that radio would be capable of
23 frequency in at least the low end of the 470 to 512 band.
24 Correct?

25 A Right. There's various splits of frequency

1 operating bands for individual radios determined by the
2 manufacturer. Some of those splits can be exceeded. Some
3 of them can't be. Just because a radio is spec'd from the
4 manufacturer at 450 to 470, that doesn't mean it will not
5 operate 470 to 476. The majority of the time they will.
6 Though, occasionally, they're stopped in programming and
7 then it will not physically allow it because of software;
8 and it varies from manufacturer to manufacturer and radio to
9 radio.

10 Q Now, was there specific -- with respect to the 470
11 to 512 trunking service that you provided, were there
12 specific types of radios that had to be sold or kept in
13 inventory to provide that sort of service to customers?

14 A The UHF trunking was done primarily with the E.F.
15 Johnson and the Kenwood series of radios.

16 Q Okay. Were there specific models with respect to
17 that?

18 A There are. There's a series of models by both
19 manufacturers.

20 Q Okay. Turn to BIN1027 on the first page of the
21 document.

22 A Okay.

23 Q And you'll see Kenwood TK353, and under frequency,
24 it says 500 there.

25 A Right.

1 Q That would be a reference to 470 to 512 trunking?

2 A I don't know. I know that's a Kenwood portable,
3 but I don't know its specs.

4 Q Okay.

5 A I haven't been personally involved in radio
6 themselves for some time, so I can't -- I can tell you it's
7 a Kenwood portable. And if it says 500, it means it would
8 work between 490 and 512 megahertz. But generally, the
9 equipment on 500 would not work 470, and 470 would not work
10 500. Generally. Though there are a number of
11 manufacturers' radios such as Bendix King and Icom that will
12 do the spread.

13 MR. SCHAUBLE: Your Honor, could we go off the
14 record for a couple minutes?

15 THE COURT: All right. We'll take a five minute
16 break.

17 (Whereupon, a short recess was taken.)

18 THE COURT: Go ahead, Mr. Schauble.

19 MR. SCHAUBLE: No further questions, Your Honor.
20 Thank you, Mr. Kay.

21 THE WITNESS: Thank you.

22 MR. KELLER: Just a couple of brief follow-up
23 questions.

24 THE COURT: Go ahead.

25 //

1 REDIRECT EXAMINATION

2 BY MR. KELLER:

3 Q Mr. Kay, you testified earlier regarding the
4 finders' preference program. Right?

5 A Yes.

6 Q And you testified, I believe, it was your
7 understanding that the finders preference program was that
8 the -- the underlying theory of the finders preference
9 program was to reward licensees for their investigating or
10 their effect in assisting the FCC in their enforcement
11 activities. Correct?

12 A In specific cases, discontinued or nonconstructed
13 stations, yes.

14 Q Okay. Now, you filed -- in your career, you've
15 filed a number of finders' preference requests. Have you
16 not?

17 MR. SCHAUBLE: Your Honor, I object on the basis
18 that this is beyond the scope of the redirect.

19 MR. KELLER: Your Honor, this is going to go to
20 the --

21 THE COURT: Overruled.

22 THE WITNESS: I don't know the exact number --
23 somewhere between about eight and fifteen.

24 BY MR. KELLER:

25 Q Is it also true though that in addition to finders

1 preference requests, you sometimes filed simple letters
2 pointing out a situation and requesting the license be
3 canceled?

4 A I was just trying to clear dead wood off the
5 spectrum.

6 Q But that would be something -- is it true that you
7 also filed simple letters asking that -- pointing out a
8 situation to the Commission and asking that the license be
9 canceled and removed from the database. Correct?

10 A Yes, I did that many times.

11 Q Are you familiar with the -- when you got the
12 formal letter denying the Thompson Tree finding preference,
13 it did state, did it not, that the reason the request was
14 being denied was pursuant to a certain condition or
15 exception to the finders' preference program, that a
16 finders' preference is not available where the matter that
17 you brought to their attention is already the subject of an
18 investigation? Is that correct?

19 A Yes.

20 Q Okay. And you understand -- do you have a belief
21 or an understanding as to the purpose for that exception?

22 MR. SCHAUBLE: Objection. It's irrelevant.

23 THE COURT: Overruled.

24 THE WITNESS: Yes, I understand the purpose is so
25 that a licensee cannot get a gain, a preference, by virtue

1 of an already existing Commission investigation, which I
2 believe the underpinning thought on that in the finders'
3 preference program, was that the Commission itself was
4 already investigating on its own notion.

5 BY MR. KELLER:

6 Q So, in other words, the Commission is going to --
7 assuming all other things are appropriate -- will reward you
8 with a finders' preference if you go out and do the
9 investigative work in the field and discover the situation
10 and bring it to their attention. But they will not reward
11 you if you just happen to learn somehow that the matter's
12 already subject to investigation and rush in with a finders'
13 preference request. Correct?

14 A Precisely. The Commission was not intending to
15 allow licensees to gain benefit as a result of work the
16 Commission already had in progress. The licensees, the
17 finders, were expected to go out and find it and bring
18 something that heretofore had not been to the attention of
19 the Commission, and thus would be rewarded for their efforts
20 if it proved correct.

21 Q Now, when you got the letter denying the finders'
22 preference request for the Thompson Tree situation, and it
23 made reference to a previous investigation or prior
24 investigation, did you later come to know what that prior
25 investigation was?

1 A It was my own complaint, which -- well, I guess
2 you could say the dismissal was on the basis of my own prior
3 complaint. It struck me as somewhat amusing.

4 Q So, in other words, this was not a situation where
5 the Commission had independent of any information you had
6 brought to the authorities put in to investigate the
7 situation. Correct?

8 A Their investigation was caused by my own filing a
9 formal complaint. So, in a way, I guess you'd say I shot
10 myself in the foot by complaining informally, then
11 complaining formally.

12 Q Is it true that you complained formally or you
13 filed a finders' preference request precisely because they
14 were not following up on the informal request?

15 A I had no knowledge that they had been following up
16 on the previous informal request, and that's why I filed the
17 formal request.

18 Q Okay. In all the years that you have filed
19 finders' preference requests, have you ever had one denied
20 on the grounds that it was already being investigated
21 pursuant to a matter that you, yourself had brought to the
22 Commission's attention?

23 MR. SCHAUBLE: Objection. Relevance?

24 THE COURT: Overruled.

25 THE WITNESS: No, I hadn't. It was unique. I

1 think to this day it remains unique.

2 MR. KELLER: I have no further questions.

3 THE COURT: Is there any follow-up?

4 MR. SCHAUBLE: Nothing, Your Honor.

5 THE COURT: You are excused. Thank you, Mr. Kay.

6 THE WITNESS: Thank you. Escape back to
7 California. They have palm trees and warm weather.

8 (Witness excused.)

9 THE COURT: All right. I assume both parties --
10 there are no further witnesses, and it's right to close the
11 record in this case. Am I correct?

12 MR. SCHAUBLE: It is correct that they do not
13 intend to provide further testimony from Mr. Kay in the
14 nature of --

15 MR. KELLER: That's correct. We plan to offer
16 no --

17 MR. SCHAUBLE: Your Honor, I do have one motion at
18 this time.

19 THE COURT: What is the motion?

20 MR. SCHAUBLE: Motion to strike pages 1 through 52
21 of Kay Exhibit 47. These are the certificates, et cetera.
22 Your Honor allowed this in subject to it somehow being tied
23 in with information concerning rentals and things like that.
24 And there was no testimony whatsoever provided on this
25 matter. So, at this time the Bureau would move to strike.

1 MR. SHAINIS: What pages?

2 MR. SCHAUBLE: One through 52.

3 MR. SHAINIS: And that's on Exhibit 40?

4 MR. SCHAUBLE: Forty-seven.

5 MR. KELLER: Let me -- well, I believe there's
6 been enough general testimony to warrant all of them
7 although although I will respond to specific ones of these
8 if you'll give me a moment.

9 First of all, with respect to page 2, I believe
10 there's been testimony from Mr. Kay and others regarding
11 various times when radios and services were loaned to, or
12 accommodations were made for, Boy Scouts. That's page 2.

13 If you'll note that page 5 makes a specific
14 reference to a paging service, although I guess -- so, only
15 page 16, 17.

16 Page 21 specifically references donations of
17 radios.

18 MR. SCHAUBLE: The Page 21 I have is a check.

19 MR. KELLER: All right. Maybe my pagination is
20 off. Cavalry Chapel Montebello -- look at the next page.
21 What page number do you have that as?

22 MR. SCHAUBLE: I have that as 22.

23 MR. KELLER: Page 22. Maybe I misspoke. That is
24 what I got.

25 Page 22 makes a specific reference to donations of

1 radios, as does 24, 25. Your Honor, I mean, when you go
2 through here, many of these documents specifically have
3 referenced radios. There are some of them that do not
4 specifically reference that, although there has been general
5 testimony. I don't think it's necessary to strike it. I
6 think certainly Your Honor is capable of giving it the
7 weight that you feel it deserves at the time.

8 Now, the overall -- the vast majority of the pages
9 have a specific tie-in. And as to the few that don't, I
10 would say even as (unintelligible) of those, there's been
11 specific testimony as to the organizations, or general
12 testimony regarding charitable activities in general. But
13 we'd make the document admissible, and then as to any
14 specific page, you -- I'm not sure how much weight you're
15 going to put on each specific page anyway, but to the extent
16 that you are, you can assess its weight.

17 THE COURT: Well, I agree with you. If it's not
18 corroborative of the showing that the use group mobiles was
19 given --; if it's not demonstrated on the record, then it
20 won't be considered.

21 Before we close the record, if you want to recall
22 Mr. Kay and ask him about whether these were in connection
23 with mobiles that he gave to these organizations, you can do
24 it. If you don't, then I'll just have to make a judgment
25 based on the record as it exists.

1 MR. KELLER: Well, I have no problem with your
2 making a judgment on the record as it exists, Your Honor.
3 And I also -- I mean, I would not strenuously object to --
4 on that basis, even striking specific things. But Mr.
5 Schauble has asked to strike pages 1 through 52. And it's
6 clear that some of those pages are not appropriately
7 stricken.

8 THE COURT: I think the easiest thing is just if
9 it doesn't -- if it's not clear either on the basis of the
10 document itself or any testimony given by any of the
11 witnesses, then it will not be considered.

12 MR. KELLER: And we certainly will not directly
13 rely on it.

14 THE COURT: It will not be relied on.

15 MR. SCHAUBLE: Very well, Your Honor.

16 THE COURT: Rather than go through page by page, I
17 think that's the way I am going to handle it.

18 All right. Anything else? I'd like to ask you
19 one question, Mr. Schauble. The Motorola case which was an
20 order decision of the Private Radio Bureau -- has that ever
21 been reconsidered or modified in any way? The Motorola
22 decision? The order issued July 30, 1985?

23 MR. SCHAUBLE: Your Honor, I don't think the case
24 has ever been formally reconsidered. There's been some
25 cases which discuss the Motorola decision and what exactly

1 that decision means. But I'm not aware of anything --

2 MR. KNOWLES-KELLETT: We're not aware of a direct
3 appeal.

4 THE COURT: Well, by the Bureau itself. By either
5 the Wireless Bureau -- has the Wireless Bureau ever
6 reconsidered that decision and said --

7 MR. KNOWLES-KELLETT: I don't think there was a
8 direct appeal. So, I don't think there was any -- you know,
9 they've thought about the underlying issues since then and
10 discussed the case. But they haven't done a direct -- there
11 was no direct appeal. So, that was the final order.

12 THE COURT: And there isn't any writing since then
13 in any way reconsidering --

14 MR. KELLER: Your Honor, I will represent to you,
15 and when we do our briefs certainly we'll give you the
16 specifics, but that the Motorola decision that you're
17 referring to, even though -- it's a strange case because it
18 was never formally reported, so you won't find it if you go
19 look in Pike and Fischer or the FCC Reports. However, it
20 was referenced many times subsequently.

21 And Counsel can correct me if they disagree with
22 this characterization, but it became, if you will, the lead
23 case. It became the Holy Grail, if you will, in assessing
24 the propriety of SMR management agreements or private radio
25 management agreements.

1 There has been some subsequent pronouncements by
2 the Wireless Bureau regarding the use of or the application
3 of the so-called Intermountain Microwave standards or the
4 Intermountain Microwave case to assessments of issues of
5 transfer of control in CMRS, or commercial mobile radio
6 service. But I would further submit that that is largely
7 post the operative time of this case.

8 This case was designated in December of 1994.
9 Certainly, the operative events extend backwards from that.
10 And the services in which Mr. Kay operates did not formally
11 become CMRS -- without even conceding one way or the other
12 what the precise regulatory status of his facilities are --
13 none of the facilities that he operates were being converted
14 to CMRS until after the institution of this case.

15 I'll further state that I don't believe there's
16 really an inconsistency between Intermountain Microwave and
17 the Motorola case. Intermountain Microwave is merely a
18 listing of various disjunctive factors to be considered in
19 assessing transfer of control. The Motorola case is a
20 specific look at what is or is not a transfer of control
21 under a specific set of circumstances, namely an SMR
22 facility being managed and operated by a non-licensee.

23 MR. SCHAUBLE: Your Honor --

24 THE COURT: It sets forth guidelines, too, for
25 determining whether that type of agreement that constitutes

1 transfer of control --

2 MR. KELLER: I'm just reacting to the frequently -
3 - in some pronouncements that I've seen or arguments that
4 I've seen, there seems to be a dichotomy set up -- well,
5 Motorola versus Intermountain. I'm suggesting to you that I
6 don't know that the two cases are inconsistent. I would
7 just suggest that Motorola is a more specific discussion of
8 transfer of control in a specific context. And indeed, the
9 specific context that we're faced with here.

10 MR. SCHAUBLE: Your Honor, I think the Bureau
11 agrees that Motorola and the Intermountain factions are not
12 necessarily inconsistent.

13 THE COURT: Well, Intermountain deals with a
14 situation where there isn't a management agreement.

15 MR. KNOWLES-KELLETT: Well, when they designated
16 Sobel in the 1994 management agreement --

17 MR. SCHAUBLE: It is with the Commission.

18 MR. KNOWLES-KELLETT: It specifically said, "Apply
19 Intermountain to the management agreement." So, that's
20 specifically on point in the timeframe we're talking about
21 here.

22 THE COURT: Does the Commission say in their
23 order, "Disregard Motorola"?

24 MR. KNOWLES-KELLETT: I think they -- I don't
25 recall whether they discussed Motorola or not in that order,

1 Your Honor.

2 MR. KELLER: That's precisely my point, Your
3 Honor. Saying, "apply Intermountain Microwave" is like
4 saying, "apply Section 310D of the Act" in a sense. Of
5 course, one is not going to discuss transfer of control, and
6 it's unlikely that one is going to discuss transfer of
7 control without some mention and analysis of the
8 Intermountain Microwave factors, but by no means undercuts
9 anything, in my opinion, that is stated in the Motorola
10 decision.

11 In fact, the Motorola decision in those analyses
12 are part of what one would look at in applying one or more
13 of the Intermountain criteria. Intermountain simply lists
14 the criteria that's helpful to look at. The case itself
15 doesn't even tell you how to weigh the criteria. It just
16 says, "Here's some factors that it's helpful to look at in
17 determining whether there's a transfer of control."
18 Substantive cases say no one of these factors is more
19 important than the others. You have to look at each in a
20 specific context.

21 And what I'm suggesting is Motorola is the most
22 complete statement we have to date of how to look at a SMR
23 management agreement. And more importantly, it certainly
24 was the law of the land that people would have been
25 operating under in 1991, 1992, 1993, in entering into

1 management agreements.

2 MR. KNOWLES-KELLETT: There was some other cases
3 during that timeframe. And so, it was not -- we disagree
4 with his statement that it's really the Holy Grail. There
5 were other cases, some of which went to the Court of
6 Appeals. Ellis Thompson went up and got remanded.

7 MR. KELLER: Ellis Thompson was cellular. Ellis
8 Thompson was also a -- really, a situation more of -- I
9 guess, probably is more correctly called a real party in
10 interest. Ellis Thompson had to do with arrangements that
11 the applicant made prior. But it was also in cellular where
12 in Part 22, common carrier, from earliest days,
13 Intermountain Mountain had been applied and rarely, if ever,
14 did questions of Motorola or management agreements ever come
15 up.

16 THE COURT: I had a control issue involving
17 cellular --

18 MR. KELLER: Well, you had the Ellis Thompson
19 issue.

20 THE COURT: Well, the Ellis Thompson case, but the
21 one before that, the one in which -- I can't think of it,
22 but --

23 MR. SCHAUBLE: Is it Star, Your Honor?

24 THE COURT: Star, yes. Star.

25 MR. KELLER: Although, Star and Ellis Thompson

1 would be very similar cases.

2 THE COURT: Yes.

3 MR. KELLER: They're both cellular. They're both
4 Part 22.

5 THE COURT: And we looked at all the indicia in
6 that case.

7 MR. KELLER: But all I'm suggesting --

8 THE COURT: But we didn't deal with a specific
9 management agreement as the sole basis for the charge of
10 transfer of control.

11 MR. KELLER: It was a commonly stated principle.
12 I don't know how accurate it was. But it was a commonly
13 stated and understood principle prior to conversion to CMRS
14 that the standards for what constituted a transfer of
15 control in the private radio services, and with respect to
16 SMR systems in general was a -- to use terms appropo of the
17 day -- I suppose a lower bar, if you will, then, with
18 respect to common carrier systems.

19 MR. KNOWLES-KELLETT: We disagree, Your Honor.
20 And in fact, Congress told the Commission to think about
21 regulatory parity back in '92. Mr. Kay operates what are
22 now CMRS and which were in the process of becoming CMRS
23 system in 1994. He was grandfathered for a certain period
24 of time under CMRS rules. But we don't think that that --

25 MR. KELLER: Which is just my point. The

1 conversion didn't happen until after -- I believe the formal
2 conversion date was July 1, June 1, 1995 -- something like
3 that.

4 MR. KNOWLES-KELLETT: I believe it was summer
5 1995. But I don't think that there's necessarily a lower
6 bar for transferring control during that period.

7 THE COURT: Well, we really don't in this case
8 have a transfer of control issue.

9 MR. KNOWLES-KELLETT: We may. Who knows what the
10 Commission will do? Send it back or whatever.

11 THE COURT: Well --

12 MR. KNOWLES-KELLETT: But the way it's framed, we
13 don't have it. And it's a little tricky to --

14 MR. KELLER: Well, may I say -- I'm sorry.
15 Continue, Counsel.

16 MR. KNOWLES-KELLETT: It's just a little tricky to
17 decide everything with the Sobel hearings still pending.

18 MR. KELLER: I want to say I agree; we do not have
19 a transfer of control issue here. But we do have an issue
20 in this case: What effect, if any, does the participation in
21 an unauthorized transfer of control -- namely, the
22 unauthorized transfer of control that was found in the Sobel
23 idea that is now on appeal -- have on Mr. Kay's
24 qualifications? And I think the understanding that was in
25 place at the time the agreements were entered into prior to

1 designation is certainly relevant.

2 I mean, it's one thing if a licensee knows full
3 well what certain requirements are and then blatantly
4 ignores them. That would indicate one thing about his
5 qualifications.

6 If a licensee and the industry in general have a
7 certain understanding, act accordingly, and then later --
8 without even getting into whether the decisions are
9 prudent -- the Commission has a regulatory change of heart
10 and clarifies the policies, I think that would indicate a
11 different interpretation of how the alleged violation would
12 impact the licensee's qualifications.

13 So, I do not know that -- I think this discussion
14 is nonetheless highly relevant. The fact that Motorola was
15 out there as the sort of guidance, if you will, on SMR
16 management agreements is definitely relevant to the question
17 of Mr. Kay's understandings.

18 THE COURT: I assume what we're talking about is
19 Issue D, to determine whether Kay has abused the
20 Commission's process.

21 MR. SCHAUBLE: Your Honor, we're talking about --
22 is one of the issues added by Judge Sippel.

23 MR. KNOWLES-KELLETT: Right. But there's also the
24 overall issue. Is Kay qualified to be a Commission
25 licensee?

1 THE COURT: Well, that's a misrepresentation
2 issue.

3 MR. SCHAUBLE: There are two issues, Your Honor.
4 The issue to determine whether Mr. Kay misrepresented facts
5 or lacked candor in the January 1995 affidavit. The other
6 issue Judge Sippel had was to determine the impact of the
7 finding of transfer of control on Kay's qualifications to be
8 a licensee.

9 MR. KELLER: And for what impact, if any.

10 MR. SCHAUBLE: What impact --

11 MR. KELLER: Over our objections, collateral
12 estoppel was applied on the transfer of control itself. So
13 then, we sort of assume the transfer of control, but then
14 say, what question -- what impact does it have on his
15 qualifications?

16 MR. SCHAUBLE: And this was an issue -- this was
17 issues added separately by Judge Sippel.

18 THE COURT: I don't know how this is different
19 than D, frankly.

20 MR. SCHAUBLE: There is a relationship, Your
21 Honor.

22 THE COURT: I don't know how there was a transfer
23 of control if there was never any transfer. Either
24 initially, Kay acquired these licenses under assumed
25 names -- under dummies or something like pawns -- or he

1 didn't. But there was never any subsequent transfer. So, I
2 have difficulty dealing with where the transfer comes from.

3 MR. KELLER: It's the same concept I think you
4 articulated in the Ellis Thompson decision. It should have
5 been -- you know, assuming there's any validity to the
6 issue, which we don't believe there is, it was probably
7 better framed as a real party in interest rather than --

8 THE COURT: All right.

9 MR. SHAINIS: Your Honor, there's also a motion
10 pending before you which would have an impact, I believe, on
11 the specific findings relative to the testimony of Paul Oei.

12 THE COURT: Oh.

13 MR. KNOWLES-KELLETT: You stated that you'd look
14 at the transcript --

15 THE COURT: I'm not going to. I'm just going to
16 review the record, consider what the parties have said, and
17 make a determination. But I'm not going to strike it at
18 this stage. I think it's just as easy to do it in the other
19 case. If I find that I shouldn't consider that testimony --
20 and first of all, there's a serious question in view of the
21 evidence, frankly, whether that makes one difference --
22 makes any difference at all when I consider that testimony.

23 Hopefully, I know the Bureau in the past has
24 stipulated at least on two issues, that there isn't
25 sufficient evidence to go forward. And the Bureau indicated

1 that with respect to that interference issue, that they
2 would review it and maybe make a similar determination. And
3 if they do, then, of course, that would eliminate
4 consideration of it, and I wouldn't have to consider it.

5 MR. KNOWLES-KELLETT: We can live with that.

6 THE COURT: You just have to wait and see. But I
7 think the Bureau isn't going to stake the record on that
8 issue.

9 So, I propose at this time to close the record in
10 this case. And off the record, the parties have agreed on
11 the following dates for filing the proposed findings and
12 replies -- a statement the Bureau has agreed to and I concur
13 in.

14 The proposed findings of fact will be filed on or
15 before March 26, 1999. And any replies shall be filed on
16 April 16 -- on or before April 16, 1999. And the parties --
17 these are the dates that the documents shall be delivered to
18 the parties, either by hand or if some other service is
19 used, so that it will reach the parties on that date.

20 MR. KNOWLES-KELLETT: Understood.

21 MR. SCHAUBLE: Your Honor, are you directing the
22 parties to file findings on each of the issues in this case?

23 THE COURT: Unless you're prepared to stipulate
24 that there's no basis for -- or if you haven't met your
25 burden on a specific issue, then I expect you to file

1 findings on these issues, yes.

2 MR. SCHAUBLE: Thank you, Your Honor.

3 THE COURT: I assume --

4 MR. KELLER: Well, again, I think -- are you
5 referring to -- is there a specific reason for that?

6 MR. SCHAUBLE: Your Honor, to be honest, I've had
7 an experience in another case where parties did not file for
8 post findings on a given issue in a case, and then turned
9 around and presented all their arguments in reply findings.
10 And that presented a problem.

11 I'm just trying to avoid that sort of problem.
12 That's the only reason I --

13 THE COURT: That's not the situation here. I
14 expect the parties to file findings on all the issues unless
15 there's a stipulation that the Bureau has not met the burden
16 on certain issues.

17 That's happened on two issues. Perhaps parties
18 will agree on some other issues, but we'll have to wait and
19 see.

20 MR. KELLER: I suppose what he's directing, Your
21 Honor, if we take the position that the Bureau has not met
22 its burden, either in proceeding or proof on a certain
23 issue, and we don't say a whole lot more than that in some
24 general findings and conclusions, to what extent are we then
25 limited in replying to what the Bureau does propose on those

1 issues?

2 THE COURT: Well --

3 MR. KELLER: I would say the answer would be the
4 scope of what they propose, but --

5 THE COURT: Yes. I would expect that both parties
6 will file findings, what the record shows -- what they
7 believe the record shows and the conclusions reached on the
8 basis of that record and the governing law, and then file
9 replies to those positions in replies, if there are any
10 replies.

11 MR. KELLER: Very well.

12 THE COURT: All right. Thank you very much.
13 We're now in recess.

14 (Whereupon, at 11:30 a.m., the hearing concluded.)

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REPORTER'S CERTIFICATE

FCC DOCKET NO.: 94-147

CASE TITLE: IN RE: JAMES A. KAY, JR.

HEARING DATE: January 20, 1999

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date: 1-20-99

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I hereby certify that the proceedings and evidence were fully and accurately transcribed from the tapes and notes provided by the above named reporter in the above case before the Federal Communications Commission.

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I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission was proofread on the date specified below.

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